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AMERICAN INDIAN WATER LAW SYMPOSIUM

University of Tulsa,
College of Law
Tulsa, Oklahoma
April 11, 1980

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SPEAKERS: Robert Pelcyger, Attorney, Native American Rights Fund, Boulder, Colo.
Reid Chambers, Partner, Sonosky, Chambers & Sachse, Washington, D.C.
John Vance, Former Chairman, Indian Claims Commission, Professor of Law, University of Toledo, College of Law
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RENNARD STRICKLAND:

On behalf of the American Indian law students at the University of Tulsa I want to welcome you to this meeting. I think all of us hold a belief that law can be, when properly used, an important weapon in the battle for the rights of Indian people. On that premise we have gathered here this afternoon.

I have brought along an item from our special collections which we just recently acquired, a 1787 ordinance of the State of Georgia. All of us who have worked in the field for a long time have heard about laws like this, but this is the first time I have actually seen a printed copy of this law. It is entitled An Act for Suppression of the Indian

Being Enacted by the Representatives of the Free Men of the State of Georgia in General Assembly. "Met and by the authority of the same that from and immediately after the passing of this act the Creek Indians shall be considered as without the protection of this state and it shall be lawful for the government and the people of the same to put to death or capture the said Indians wheresoever they may be found within the limit of the state." I read this simply to suggest the magnitude of the dangers that are present in the abuse of law.

This afternoon we are focusing on an area of the law which I think everyone who works in the field of Indian law believes is a crucial one at this particular juncture in American Indian law and history. We have some of the most distinguished figures in the field on our panel and some equally distinguished members in our audience. One of the things we hope for this afternoon is a discussion of questions concerning where we are, where we should go and what we ought to be doing at this time in the field.

Our first and principal speaker is Mr. Robert Pelcyger from the Native American Rights Fund, a knowledgeable attorney who is universally regarded for his support of Indian rights and for his understanding of Indian water law.

MR. PELCYGER:

Thank you, Rennard, for your kind introduction and thank you for inviting me here to talk with you today. I am very happy to be here, among other reasons, because I think we are at a particularly critical juncture in the field of Indian water rights. We stand at an important crossroads. This is the theme I would like to address today. In keeping with the spirit of being here at the University of Tulsa, I am going to try to view things from a historical perspective.

We practicing attorneys wait on and endlessly analyze, it seems, every word, every sentence, every footnote in relevant Supreme Court decisions to get clues or cues about which way the law and the Court are heading. The problem is that we are getting very conflicting signals. The Supreme Court has not directly addressed any substantive aspects of Indian water rights since its 1963 decision in *Arizona v. California*.¹ An important aspect of that decision is that, apart from dealing with Indian water rights, the Supreme Court for the first time, applied concepts and principles that had been developed in prior In-

1. 373 U.S. 546 (1963).

dian cases to other federal reservations, such as federal wildlife areas and forests. The Court held that these enclaves were also entitled to reserved rights under similar doctrinal principles that had previously been applied to Indian water rights.

This development, although seemingly innocuous from the standpoint of Indian water rights at the time, contributes significantly to some of the present problems that we practitioners in the field of Indian water rights are now facing. Because the Supreme Court has not, since 1963, directly addressed any substantive aspects of Indian water rights, we must look elsewhere to determine the thinking of the current Court. In 1976, the Supreme Court rendered an important decision in the case of *Cappaert v. United States*.² It was a unanimous decision, a resounding victory for federally reserved rights. It was not an Indian case. It involved water rights for the pupfish, an endangered species in the Devil's Hole National Monument. The Supreme Court held that when Devil's Hole was set aside, sufficient water to maintain the pupfish was implicitly reserved.

Cappaert was the first case to apply the concept of federally reserved water rights to groundwater. The Court seemed to go out of its way to strengthen the Federally Reserved Rights Doctrine. For example, the Court stated that when federal reserved water rights are involved there is no balancing test. Rather, the question is how much water is required to fulfill the federal purpose and that comes first regardless of whatever economic or other impact competing water users might suffer. This 1976 decision was rendered by the same nine justices who have remained on the Court to the present time.

A very different signal emanated from the Court on July 2, 1978. Two decisions were handed down in water cases that day. Neither one involved Indian water rights. The two cases were *United States v. New Mexico*³ and *California v. United States*.⁴ The California case dealt with section 8 of the Federal Reclamation Act of 1902 which provides that the Secretary of the Interior shall abide by state water law in carrying out reclamation projects. Prior Supreme Court decisions had construed this provision very narrowly to limit the applicability of state law. California decided to try again. This time, the Supreme Court reversed its prior decisions and held that the provision did indeed mean

2. 426 U.S. 128 (1976).

3. 438 U.S. 696 (1978).

4. 438 U.S. 645 (1978).

what it said. The Court went further and stated that section 8 reflected the federal policy of deferring to state water law. Reference was made to the Congressional debates on the Reclamation Act of 1902 which seemed to indicate that deferral to state water laws was not only a matter of federal policy, but was required by the Constitution itself.

The decision in *California v. United States* formed the backdrop for the opinion issued the same day in *United States v. New Mexico*. The federal government claimed water rights for a wide variety of uses. Minimum stream flows were among the purposes for which national forests were established. The Supreme Court majority rejected the government's position and held that the only purposes for which water was reserved for national forests were for management of timber and conservation of flows. The opinion began by analyzing the general contours of the Federal Reserved Rights Doctrine. Federally reserved rights were to be construed as a limited exception to the general policy deferring to state water law. Therefore, courts should narrowly construe the purposes for which reservations were established to limit the scope of federally reserved water rights. Indeed, for the first time in the case law, a distinction was made between the primary purposes of the reservation and secondary uses for water. The Court held that water was reserved only for the primary purposes. When the federal government wants to use water for secondary uses, it must go to the state and apply for a water permit and comply with state procedures. This is the most narrow construction of federally reserved water rights in any Supreme Court case. It bears repetition that the members of the Court are the same nine justices who only two years before had emphatically reaffirmed, expanded, and strengthened the Reserved Rights Doctrine in the *Cappaert* case.

Another recent decision which might provide some helpful clues is the 1979 Indian fishing rights case, *Washington v. Fishing Vessel Association*.⁵ At issue was how Indians and non-Indians were to divide limited fishery resources in western Washington. The district court and the court of appeals held that the Indians were entitled to at least fifty percent of the harvestable off-reservation catch and the non-Indians would have the right to the other fifty percent. The government and tribal attorneys looked to Indian water law to provide some analogy as to how a limited resource should be allocated between Indians and non-Indians. In its decision the Supreme Court did refer to these In-

5. 443 U.S. 658 (1979).

dian water rights cases and it held that the Indian rights extended up to fifty percent of the harvestable catch. For the first time, however, the Supreme Court injected in the Reserved Rights Doctrine the concept that Indian rights were limited to what was required for the Indians to sustain a "moderate living." It remains to be seen whether this standard will be applied to on-reservation water rights. If it is, it could mark a substantial retreat from the "practicably irrigable acreage" criterion of *Arizona v. California* which measured the extent of Indian water rights according to what is required to develop the Indians' resources rather than by the number of Indians or their needs at any given time.

The only Indian water rights case to have reached the Supreme Court in recent years concerned procedural rather than substantive matters. The question presented was whether the McCarran Amendment, enacted by Congress in 1952, applies to Indian reserved water rights and permits their adjudication in state courts. Both the tribes and the United States have vigorously objected to the adjudication of Indian water rights in state courts. In other contexts, the Supreme Court seems to have recognized that state courts are not fair forums for the adjudication of Indian rights. However, in 1976 the Court held in *Colorado River Water Conservation District v. United States*⁶ that the McCarran Amendment does constitute consent for the United States to be sued in state court for the adjudication of Indian water rights. The Supreme Court recently declined to reexamine the basis of that decision in *Jicarilla Apache Tribe v. United States*.⁷

All of this does not augur especially well for the future of Indian reserved water rights. Faced with this backdrop, what can be done and where do we go? I suggest that we turn to history to the first principles with the objective of clearly staking out Indian water rights as separate and distinct from the reserved rights of other federal establishments.

Discussions of Indian water rights generally start with the landmark case of *Winters v. United States*,⁸ decided by the Supreme Court in 1908. The roots of the doctrine, I suggest, go back much further. The *Winters* decision must be viewed, not as a departure from a general policy of deferring to state law in water matters, but as resting on firmly established principles of Indian law. The place to begin is

6. 424 U.S. 800 (1976).

7. 601 F.2d 1116 (10th Cir. 1979), *cert. denied*, 444 U.S. 995 (1979).

8. 207 U.S. 564 (1908).

Chief Justice Marshall's seminal opinion in *Worcester v. Georgia*,⁹ and its progeny, holding that state law does not apply to Indians within reservations or to Indian property.

In *United States v. Kagama*,¹⁰ the Supreme Court in 1886 stated that the people of the states were the Indians' deadliest enemies. In this historical context, it would be inconceivable, for the purposes of Indian reservations and the fulfillment of federal Indian policy, to depend on the various state water laws and the discretionary acts of state officials. Within the confines of Indian reservations, federal law was to apply, to the exclusion of state law, unless and until Congress specifically legislated to the contrary. This is apparent not only from *Worcester* and the Supreme Court later decisions, but also from the federal Constitution, which carves out a special place for Indians. This is also apparent from the Indian disclaimer provisions in most of the constitutions, enabling acts, and organic acts of the Western states, in which, as a condition for their admission to the union, the states agreed that Indian lands would be subject to the absolute jurisdiction of the federal government.

Therefore, the first principle upon which the Indian Reserved Water Rights Doctrine is predicated is that state law simply does not and could not apply, regardless of the federal government's policy in other areas. There has never been any manifestation of a Congressional intent to defer to state water laws with regard to Indian lands. The only remaining question, then, is what should be the content of the federal law defining Indian water rights.

To answer this question, I turn to another pre-*Winters* precedent, *United States v. Winans*,¹¹ which like *Washington v. Fishing Vessel Association*, involved off-reservation Indian fishing rights. In *Winans*, the Indians had reserved off-reservation fishing rights when they accepted much smaller reservations for their permanent homes. The Indians were denied access to their off-reservation fishing sites by private landowners abutting the stream. The Supreme Court held that part of the Indians' reserved fishing right included an easement to cross private lands to obtain access to off-reservation sites. Without the easement, the Indians could not exercise their fishing rights. So, prior to *Winters*, the Supreme Court held that the Indians retained the rights that are necessary to carry out the purpose and the effect of the treaty.

9. 31 U.S. (6 Pet.) 515 (1832).

10. 118 U.S. 375 (1886).

11. 198 U.S. 371 (1905).

There is another relevant aspect of the *Winans* decision. The non-Indians, Mr. Winans and others, maintained a very efficient fishing wheel by virtue of a license issued by the state which interfered with the Indians' fish taking operations. The Supreme Court held that the state license could not infringe upon the rights of the Indians reserved by the treaty.

Prior to the *Winters* decision, then, two crucial principles emerged. First, state law does not apply to Indians, or to Indian lands. Second, under federal law, the Indians retained, and the United States confirmed and reserved, the property rights that are necessary to give effect to the purpose of the federal treaties or federal Indian policies. When these two principles are applied to the water rights area, the results are very interesting.

Water rights in the western states are governed primarily by the Doctrine of Prior Appropriation. Under this doctrine, first in time is first in right. The first parties who put water to beneficial use are rewarded by obtaining priority to the water in time of shortage. This concept of prior appropriation is fundamentally inconsistent with the purpose for the establishment of Indian reservations.

The inconsistency is exemplified in the *Winters* case. Not surprisingly, the non-Indians living adjacent to the reservation along the same water course beat the Indians to the punch and put the water to use first. Under the law of prior appropriation there would not have been any water left for the Indians. The federal government's purpose in establishing the reservation, to provide a permanent home for the Indians and to transform them into agriculturalists, could not have been fulfilled under the law of prior appropriation. The Indians could not have been expected to compete successfully against the white man under the white man's rules. Since state law cannot apply to reservation Indians and their property, the only real question in the *Winters* case involved the definition and the content of the federal law. Consistent with the *Winans* decision, the Supreme Court held that sufficient water was reserved by the Indians and the federal government to give effect to the treaty and to the federal policy.

Seen in this way, *Winters* was not a radical departure from the historical policy of congressional deference to state water laws. Rather, *Winters* was grounded in, fully consistent with, and, was indeed dictated by fundamental principles of Indian law. Indian property is not governed by state law and federal law will imply whatever property

rights are necessary to give effect to federal treaties and the purposes for which Indian reservations were established. From this perspective, the aberration is not the Indian Reserved Water Rights Doctrine, but the extension of that Indian Doctrine to other federal reservations as held in *Arizona v. California* in 1963. In any event, regardless of what is or is not aberrational, Indian reserved water rights and federal reserved water rights are not the same. They are not governed by the same rules because Indians occupy a unique position with regard to their historic immunity from state law and with regard to their implied rights under federal law that are necessary to the fulfillment of federal Indians policies.

The *Winters* case held, of course, that Indians or the federal government (and I do not propose to get involved today in that debate as to who did the reserving), reserved the waters that are necessary to fulfill the purposes of the reservation. But there is more to it, I suggest, than that. In *Winters*, the non-Indians argued that the lands they occupied were previously Indian reservation lands but that they were ceded by the Indians to the United States. That cession, their argument continued, was obtained by the federal government as part of its policy to settle the West. At the time of the cession, it was contemplated that the ceded lands would be open up to homesteading by non-Indians. To be homesteaded, the lands had to be cultivated. So Mr. Winters and his codefendants argued that water was every bit as essential to fulfill the federal homesteading policy as it was to implement federal Indian policy.

The Supreme Court recognized this "conflict of implications" between the Indians' retention of the water that was necessary to their reservation and the federal government's acquisition of the water to enable the non-Indians to settle upon and cultivate the ceded lands. The Supreme Court resolved this conflict of implications in favor of the Indian, notwithstanding the acknowledged conflict between these two federal purposes concerning the legitimate expectations of both the Indians and the non-Indians. This is a very important aspect of the *Winters* decision because in so much of present day Indian water rights litigation the principal dispute is between the Indian reservations and federal reclamation projects. The issue in these cases is whether the federal government intended to extinguish whatever Indian rights were necessary to carry out the reclamation project. The *Winters* case, as I see it, is a complete answer to that contention.

The other aspect of the *Winters* case that I find fascinating is that its rationale cannot be limited to an abstract reservation of a water right. Surely the federal government did not intend to create a water right on a piece of paper that could be looked to and held up and read "see here we have the first right on the stream." It is a right to *use* water to cultivate the soil, to gain sustenance from the land. It is a vital, essential element in the policy of transforming Indians from hunters and food gatherers to a pastoral people. So the water *right* is itself only a small part of the *Winters* case which proclaims that the federal government has undertaken to provide whatever assistance is necessary to make the reservations bloom. A paper water right would not suffice to achieve that objective.

No one has yet devised a legal mechanism to make the federal government deliver on all of its promises, but that does not mean that we should stop trying. The *Winters* principles are there to lead and guide us and to serve as a reminder to the dominant society of the enormous gap between what was intended and what has resulted.

PROFESSOR STRICKLAND:

Our next speaker is Reid Chambers, who has been involved in almost all phases of the lawyering profession. He has been a law professor; he has been a government lawyer as Associate Solicitor for Indian Affairs; now he is what they sometimes like to describe as a real lawyer. He is practicing in Washington, D.C. and representing a great number of Indian tribes in the process.

MR. CHAMBERS:

Rennard, thank you and thank you all for inviting me here today. Bob Pelcyger spoke about an exceedingly important topic: the difference between state law and federal law concerning water rights. Perhaps I should begin with a brief description of these differences. Let us take any stream west of the hundredth meridian, a line roughly from Bismarck, North Dakota to Amarillo, Texas, which is generally thought of as the beginning of the West. Those of you who are from the West know that many things are called rivers in the western part of the country which really are just dry beds most of the year. When they are filled with water, who has the right to take it?

Virtually all of the western states, except those on the Pacific coast where there is more water (Oregon and California being the two excep-

tions), have adopted the Prior Appropriation Doctrine. Under that doctrine, the first in time is first in right. Suppose that the first person who comes on the stream (let's call him *A*) takes some water out of that stream and uses it beginning in 1900. *A* gets the first right on the stream. Suppose he appropriates 100 "acre feet" of water, enough water to cover one hundred acres with one foot. His "priority date," a concept I will explain in a moment, is 1900. Then *B* comes along in 1905 and appropriates 100 acre feet. He gets a water right under the prior appropriation doctrine to 100 acre feet with a 1905 priority date. What happens if there is only 100 acre feet in the stream in a dry year? *A* gets it all because *A* has the first or prior right. He can cut *B* off entirely, and it simply does not matter whether *B* has invested hundreds of thousands of dollars in a cattle industry or in digging irrigation ditches and lining them. The law is that as long as *A* continuously uses his 100 acre feet, he may continue to cut off *B*. Of course, *C* and *D* and *E* and everyone down the line are also cut off. But *A*'s use must be continuous, for unlike other property rights, appropriative water rights can be lost by abandonment.

Now, what happens if we put an Indian reservation downstream? Suppose the Indian reservation was established by a statute in 1888. This is essentially the *Winters* case. What happens if the Indian reservation, or the United States as trustee for the Indian reservation, sues *A* and *B* and *Winters* and all other non-Indians who have begun appropriating on the stream? The *Winters* case holds that enough water was reserved for beneficial purposes on the reservation when this reservation was established in 1888, and that in shortage it can cut off the defendants even though they have been appropriating water since 1900. It does not matter that the Indians have never appropriated water, or that *A* and *B* actually used water first. The early Indian "priority date"—1888—gives them the first right.

The *Winters* Doctrine may be viewed as a set of exceptions to state law. Recall that if *A* failed to use his 100 acre feet for a period of years, under state law he would lose his right and *B* would become first on the stream. So, all non-Indian appropriators must continually use the water to have a state law right. An unused right is abandoned under state law under the theory that water is so scarce that a person should not retain a right he doesn't use. The Indians, however, need never have used the water under the *Winters* Doctrine to have a *Winters* right. In 1980, this Indian reservation can decide to develop an irriga-

tion project if the Indians have a beneficial use. If the use is within the "purposes of the reservation" a concededly vague concept, the Indians can cut off *A* and *B* and every use on down the line.

State law principles of the Prior Appropriation Doctrine are in many important respects, supplanted by federal law. Put differently, federal law exempts Indian water rights from the many limitations that state law imposes on non-Indian water users. Water is not required to be put to immediate use, a right is not lost by non-use, and actual use is not the measure and extent of Indian water rights. In these respects, federal law protects Indian water rights from interference by state law doctrines.

Before discussing the purposes of this federal law doctrine, I will briefly discuss some of the cases where it has been applied. Bob mentioned the *Pyramid Lake*¹² case, which involved an Indian reservation. The land area of the reservation was shaped like a doughnut around the lake and the lake area was the terminus of the Truckee River that flowed into it. In about 1902, the federal government built a dam upstream and started taking most of the water out of the Truckee River to grow alfalfa for a federal reclamation project. Of course, gradually, the lake shrunk. The fish in the lake that were the major source of support for the tribe have died because the lake is getting too salty and they cannot get upstream to spawn. The Government belatedly sued the people diverting the water (even though the federal reclamation project was built with federal funds) and asserted the water right for the Pyramid Lake Tribe.

When I worked with the Government and we filed this suit, we left the marshal with thirteen thousand subpoenas to serve from his two-man office because he had to sue everybody along the stream to adjudicate these rights. Each of them is an indispensable party in such a property case. The issues are extremely controversial because *A* complains that he has spent half a million dollars and that his family has been here for two generations, using this water since 1900 or 1910.

This gives some insight into the single most extraordinary feature about the *Winters* case, the fact that it has been cited so infrequently. It has been the subject of very few subsequent cases. When I was a new law professor at UCLA teaching Indian law, I reluctantly decided that I had better read all of the cases that had cited the *Winters* case for a lecture on water rights. I was appalled to even think of it because I

12. *Pyramid Lake Paiute Tribe v. Morton*, 354 F. Supp. 252 (D.D.C. 1973.)

thought a landmark case of 1908 would require three or four days in the library to shepardize. I put it off as long as I could. Finally I went to the Shephard's Citator, pulled it down, and looked up *Winters*. To my astonishment, I found ten or twelve cases that had cited *Winters*. That was in 1970 or 1971. In the sixty-three years since the *Winters* case, only ten or twelve cases have applied its principles. There are many reasons for that. One reason is that you do have to sue such a large number of people to adjudicate the right, like in Pyramid Lake. When you do, they all get lawyers and the state sometimes gets involved. These cases may go on for ten, twenty, or even thirty years. Another reason is the extraordinary political sensitivity of these cases. I think it is fair to say that the United States Government has not usually had the courage to bring suits that can cut off all of the rights of these people. The defendants in such cases are the people who have been able to get the federal dollars to build projects to take the water instead of having water used on Indian reservations. The non-Indians believe that they are making the highest and best use of the water in the strictly economic sense. The senators and congressmen who got the authorizations for these non-Indian projects would, of course, protest suits such as these. So, over the years, essentially for all of these reasons, there has been no enforcement of the *Winters* Doctrine right.

Those times have ended. The exciting thing about Indian law in our generation—in the legal careers of the people in this room—is that when our children shepardize the *Winters* case, they are going to find many more than ten or twelve cases citing it. The government has become more vigorous, in recent years, in enforcing this right. Also, the states and their non-Indian water users have become more concerned about water rights. In the last couple of weeks, a suit was filed in South Dakota by the State against all of the tribes of the Sioux Nation to adjudicate all of the water rights in that State west of the Missouri River. In Montana, suits have been filed by the United States to adjudicate all of the water rights of all of the Indian tribes in Montana. Those suits were dismissed in favor of subsequent state court proceedings so that we are now in the Ninth Circuit arguing that they should not have been dismissed. In the state of Washington, three law suits adjudicating water rights are pending. Law suits have been filed to challenge the water rights of most of the Arizona tribes. There is, of course, the *Pyramid Lake* suit in Nevada concerning the right of the Pyramid Lake Tribe, which is one of the two largest tribes in Nevada.

There are suits concerning the San Juan River in New Mexico. Several suits concerning the water rights of the Indian Pueblos on the Rio Grande are pending, as is a major suit concerning the Wind River Reservation and the Big Horn River in Wyoming.

Certainly, as our legal careers progress, some of the corners of the *Winters* doctrine will be sanded down. We can only speculate on its future. The major modern suit, *Arizona v. California*, was brought to adjudicate water rights in the Colorado River below Lee's Ferry, which is essentially on the Arizona-Utah line. Seven and a half million acre feet is the average annual flow of the Colorado River. Indians were awarded one million of those acre feet, approximately fifteen percent of the acre feet of the Colorado River. Because the decree was reopened, the Indians may end up with as much as twenty percent of the flow of the lower Colorado River. Now, that is a doctrine that one would not expect to see before one went to law school.

What is the future of all this? The hard question is whether we can expect the dominant society, the two hundred million Anglos, not the million Indians, to continue to accept a doctrine like this? In an era where it is to be actively litigated? To be sure, it has not often been enforced, but the cases that have considered the issue have supported the Indians. The existence of the doctrine illustrates the creative tension between the practical bent of our society and its idealistic nature, the ambivalence our society feels in its economic aspiration to devote resources to their highest and best use, and its guilt about the way Indians have been treated in the past. To predict the future of the doctrine, more thought and more careful historical research should be done to determine why the doctrine was established. I think that the *Winters* Court intended to support a certain cultural pluralism. I think that the cases of that time, too, reflect the kind of a notion that John Marshall had about the federal protection of Indians from state sovereignty. This protection may have been seen as a necessary component of retained cultural diversity. Coercive state jurisdiction would interfere with and probably destroy that cultural diversity.

While cultural diversity is something we prize, I suspect that there is a less attractive side to the matter. The 1908 Court was the "progressive generation" in America. The progressive era was not as tolerant in race relations, at least in the sense of racial tolerance today. Perhaps *Winters* and *Winans*,¹³ seemingly pro-Indian cases of that time, come

13. 198 U.S. 371 (1905).

out of the same mold as *Plessy v. Ferguson*.¹⁴ The dominant society, in the years before World War I, essentially encouraged racial separatism. If, then, racial separatism was to be maintained on Indian reservations, it was perhaps necessary to confer enough resources to keep that society separate. The Court may, at least in a vague way, have hoped that Indians would not then come out and mingle much with the white society. Now, of course, the Warren Court in 1963 that applied the *Winters* Doctrine to *Arizona v. California* was of the opposite mentality. This Court was motivated by sympathy for the economic underdevelopment of the Indian reservations and probably not by a desire to foster or preserve a separate cultural identity for Indians. The language of the decision reflects this. The Court emphasized that "it can be said without overstatement that when the Indians were put on these reservations they were not considered to be located in the most desirable area of the Nation."¹⁵ It also stated, quoting the construing *Winters*, that Indian reservation "lands were arid and, without irrigation, were practically valueless" and when reservations were created waters were reserved "without which their lands would have been useless."¹⁶ Because of the scarcity of water in the western states, and the dependence of Indian economic development upon water, the Court perceived enforcement of federal Indian water rights as essential to economic well-being for the reservations. The decision was in keeping with broader social and political themes of the 1960's—an emphasis on economic development of minority peoples (both here and abroad), a policy of greater economic equality, somewhat consonant with the overriding commitment of the Warren Court to greater racial equality. That policy, of course, is dramatically different from the racial and cultural separatism of the Court that decided *Winters*.

While the objectives of the Court that decided *Arizona v. California* differed from the turn-of-the-century Court that decided *Winters*, the process emphasizes the health and enduring quality of the Reserved Rights Doctrine. The doctrine represents the best in our society. To be sure, the decisions reflect strain and ambivalence. But undergirding the doctrine is a dominant effort to "keep faith with the Indians."¹⁷ A truly greedy society would not endeavor to do this at all, and would not have a reserved rights doctrine. It is to our society's credit that one has de-

14. 163 U.S. 537 (1896).

15. 373 U.S. 546, 598 (1963).

16. *Id.* at 600.

17. *Arizona v. California*, 373 U.S. 546, 600 (1963).

veloped, and I believe that in our lifetimes we will see it enforced, just as we have witnessed the enforcement of the equal protection clause in protection of minority rights.

PROFESSOR STRICKLAND:

Since we are in the process of doing a bit of guessing as to where we are going, I specifically asked John Vance, former Chairman of the Indian Claims Commission and current professor of law at the University of Toledo, to look over what is happening today.

JOHN VANCE

I am a law professor. I am new to this field. I share with Reid Chambers an early childhood and youth in Washington, D.C., but very early I went to Montana and fell in love with that arid land and its people, spending all of my adult life there with the exception of a brief period in New Guinea and similar places where they have no water problems. I feel I should say that you have people here who have proven that lawyers can do the impossible. The stances taken by Reid Chambers and Kent Frizzell in their exciting work with the federal government would have been unacceptable before, and now they are the only acceptable stances. Bob Pelcyger is a walking example of the fact that the young lawyer should never see any situation as being impossible.

When things happen in Montana, they usually happen only once. One of the things that happened only once was the Custer battle, or the Custer massacre depending on how you look at it. The *Winters* case is a Montana case. I think that one of the important things about the *Winters* case is that we lawyers are talking to those country folk out there who are living with 11, 12, or 13 inches of rainfall a year. They're living on a desert and believe me they know it. As the grand old Texas historian Walter Prescott Webb wrote in *Harpers* a number of years ago, the western plains nestled up against the Rockies were a desert. It would be called a desert anywhere but Barry Goldwater and the governors of Colorado, Montana, Wyoming, and New Mexico got up in arms and said that he ought to be publicly thrashed. But he was right.

You know that saying about the Powder River up there in Montana. It is described by those who know it best as being a mile wide, an inch deep and running uphill. Indeed it does run uphill because at Rugby, North Dakota, the geographical center of the North American

continent, the great earth tilts to the north and all of the water runs up into Canada. Obviously, we should be resentful of this. We should dam it up, switch it around, and send it back down the Missouri. But in the interest of taking care of our relations with Candian brothers and sisters we don't do that. We dam up mostly on Indian reservations.

In the *Winters* case, as I read it, the Court did not say that the Indian had roamed the land and that he had the use of all that land. The reservations are what remained after everything else was taken away. The Indians had it all. One of the resources Indians first had, of course, was the water. They used it constantly. It seems to me that the argument should be made that they have always used it for the purpose for which it was needed. As a hunting and farming society, they have always used water. Since we are going to use this ridiculous theory of prior use, we should recognize that the Indian used it first and he has continued to use it and he has used all that he needs. Perhaps, this is a dangerous argument. The better argument is that the Doctrine of Prior Use ought to be disregarded. It has no more validity in modern society than many of the other doctrines that have been eliminated.

I don't anticipate this elimination because I come to you today saying that there isn't any water. The fact that there is no more water is apparent by what we have done in this country to the ground water. We really have not even gone into that as far as the law is concerned. I must tell the story about the Colorado River because when I was on the Indian Claims Commission, one of the cases that was assigned to me was the *Mohave*¹⁸ case.

Along the Colorado River where the Indians finally got a million acre feet of water, they lived and used the water for fishing and washing. A dam was built there. It went up high on the river bank because hydrologists, geologists, and water people said that this was just how high it should go. It went up even higher. The Indians nearly drowned, but they survived that one dam. But the dam people decided to build another. You know how these dam people are: "Let's have another dam down lower in the river." The Indians were farming down there when the next dam was built. They opened the dam and it was head for the high country again! So, there was substantial water moving back and forth. But the fact of the matter is simply that there is no water.

I convey to you some wonderful thoughts from our friends the

18. *Mohave Tribe v. United States*, 23 Ind. Cl. Comm. 346 (1970).

United States Army engineers. The Ogallala aquifer is the ground water that sits below us here. It sits below Nebraska, Colorado, a little tip of South Dakota, Kansas, Oklahoma, New Mexico, and Texas. Texas and California use more of the ground water than any of the states. They use more ground water than all of the states combined ought to use. Now the land above the Ogallala aquifer produces twenty-five percent of the value of export feed grain. It produces almost forty percent of all the value of the export shares of wheat and flour. Forty-three percent of all cotton is produced in this area.

It is absolutely fascinating to see what these engineers plan to do. This is what they have found. Since 1947, the water in the Ogallala aquifer has dropped 268 feet. In many areas of the country today, the water is dropping at sixteen feet per year, and in some places eighty feet per year.

What is happening to the water that is being pumped out? In the first place, some irrigation water on the crops produces almost three times as much yield. Water from the vast Ogallala Aquifer is used to irrigate over 400,000 acres of agricultural land in the panhandle of Oklahoma alone. This use, in addition to the municipal, domestic, and industrial needs of the area, is placing great stress on the Ogallala, Oklahoma's most important source of ground water. There were approximately 400 ground water wells in the panhandle area in 1960, by 1974 there were 2,067 wells tapping the water of the Ogallala. Over the past twenty five years declines in the water levels of up to 102 feet have been recorded.¹⁹

Senator Bob Kerr said he was going to in effect bring the ocean to Tulsa and he did. The Army engineers plan to take the water away from other places and bring it to you folks by gigantic viaducts, aquaducts, and the like. They also intended to take water from the Fort Peck Reservoir and divert it south into the North Platte River system in Nebraska to here. This grand plan makes no mention of drought or its consequences. Also, great coal gasification plants are being built right out there in the desert! They are requiring such enormous amounts of water that I don't know how we can continue. The fact of the matter is that every acre foot of water from the Rockies, to the plains states, to the east of the Rockies, is spoken for today. Any water taken is being taken from somebody else. I don't need to tell you

19. OKLA. WATER RESOURCES BOARD, PUB. NO. 94, OKLA. COMPREHENSIVE WATER PLAN 153 (April 1, 1980).

who that somebody else may be. The synthetic fuel program is a monster water user. What has been this great placid, beautiful underwater lake of pure clean water that we've been using is soon going to be a boiling caldron.

PROFESSOR STRICKLAND:

We thought it would be appropriate toward the end of the program to get a little bit of a perspective on some things that have been happening in Oklahoma. The most dramatic things in Indian law in Oklahoma, I believe, are ahead of us. There was a long period when the law as it related to Oklahoma reflected what the federal government had said about Indian law in the state—that there was no longer a place in the state of Oklahoma where jurisdiction remained with the Indian tribes; that all of the rights to all of the water in Oklahoma passed from Indian tribes to the state upon statehood. The last ten or fifteen years in Oklahoma have been a period in which all of the old rules of Indian law have passed out of existence. New rules of Indian law are now coming into existence, and much of what was happening in other parts of the country with regard to Indian law in the previous time frame is now beginning to happen in Oklahoma. In Oklahoma today, a new forward-looking group of Indian tribal leaders are working with a whole new generation of American Indian lawyers.

We take immense pride at the University of Tulsa in the fact that over the last 10, 15, or 20 years, the University of Tulsa has been one of the major centers for the education of Indian people who were becoming lawyers. One of the first graduates of the University of Tulsa under the American Indian Law Scholarship Program was Ralph Keen, our next speaker. We also take great pride in the fact that we have a tremendous number of Indian law graduates from 20, 30, and 40 years ago before it was fashionable for a law school to be educating Indians. Ralph is not only one of our first graduates under the Indian law scholarship. He is also one of our most distinguished graduates of the law school. Ralph has held top positions in his Cherokee tribe, top positions in the Bureau of Indian Affairs, and has now become a "real world" lawyer. One of the interesting phenomena in Indian law in the last ten or twenty years is the appearance of "real world" Indian lawyers working in the field of Indian law.

RALPH KEEN:

I plan to talk just a brief while about the *Winters* Doctrine and Indian water law in Oklahoma. A wonderful thing happened for the Indians back in 1908 in the *Winters* case. The Court said: "Look, here are all these people whom the government has been unkind to, put them on a reservation, lock them up. So we will be nice to them. We will create this judicial doctrine that they have water rights. We will put some sugar on it and we will say that the right is prior and paramount to any other, that it attached at the time of the creation of that reservation." That's pretty good isn't it? Except that nothing happened after that. Not for a long time.

Very little happened between then and *Arizona v. California*. But either way the government could sit back and say it had created this doctrine, actually a paper right to water. Water is vital in this day and age. You must have water to live; even more vital than gasoline, believe it or not. Fifty years later, another court extended that doctrine. It decided that the *Winters* Doctrine was so beneficial that our own government should have the same right for federal reserve properties, reservations not set aside for Indian people but reservations of land set aside for federal purposes. In addition, the court went beyond that and began to define how much water Indians got—all the water necessary to irrigate their land. Those five tribes of the lower Colorado River are able to use that water. There are still some open ends to that right. As Reid Chambers was saying, they hope to acquire more water in the future for those tribes. It has been beneficial. In the future, it will be more beneficial.

The government has been good to the Indian people. We have done much for them. But, in reality, what has really happened is that while some reservations have been able to benefit, most of them have not benefited. We have a seventy-year history of the judicial branch of the federal government being good to Indians. They created this doctrine and extended it everywhere. But in Oklahoma it does not exist. We have a law about this in Oklahoma that is only one sentence long. It states that all water within Oklahoma's borders belong to the State. There are two flaws in that law. First, it is contrary to international law. Oklahoma has been the only government in the world to say that water is capable of ownership. Every other government recognizes that water can be used, but that it cannot be owned. That is the first problem with the law. The second problem is that a state cannot legislate away a superior law. The *Winters* Doctrine is superior to the laws in

the state of Oklahoma. The *Winters* Doctrine is like the ground water—it's not there for Oklahoma. In Oklahoma do we have a water right? The answer is yes. The *Winters* Doctrine is a right. The federal government says we have it and we have it. We don't have to ask the state whether we have a *Winters* Doctrine. It's there. The federal government says it's there. The Supreme Court has said it's there on a hundred different occasions. It is there. We have it.

The next question is how much water? Because we are dealing with quantification, it will take a thousand experts and ten million dollars to answer that question. We Indians do not have either one. We do not know the limits of the right. But we do have a water right. The next question is whether we use our water right. But we must answer that question in the negative. Whose fault is it that we do not use our water right? The fault is ours and the federal government's because the federal government has always told us that we do not have a water right in Oklahoma. Of course, when we ask them for irrigation funds, they deny those funds. And yet, annually, the Bureau of Indian Affairs has an irrigation budget of fifty million dollars. Of that budget, twenty-five or thirty million goes to the Navaho irrigation project. The remaining funds to the lower Colorado River tribes, and the tribes in the western half of the United States with the exception of Oklahoma.

The water in Oklahoma, particularly western Oklahoma is swiftly dissipating. It is going somewhere, and it is probably being misused. Western Oklahoma has always been semi-arid, and it is becoming arid. More and more, people are trying to live all over the United States. We have more exotic and expensive uses for water. In Oklahoma, we Indians don't use the water. I travel around this state speaking with the tribes and I invariably tell them, "If you have a valid use for water and that use fits within the *Winters* Doctrine, do not request water from anyone! Get out there and use that water! Drill some wells to get that water!" If there is an Indian tribe having a legitimate use for water, and a way to scrape together the money to sink a well to put that water to beneficial use, that tribe can ignore this state. This is a very exotic doctrine. If our tribes would go out and utilize and develop what is left of this resource, those tribes will wield more influence and more power. They will obtain a potential for enriching their own tribal governments beyond anyone's comprehension.

I do not know whether we will ever make the state of Oklahoma agree that we have water rights, but it is not necessary to make the state

agree if we independently develop our water and use it. At some point in time, the state will be compelled to establish limits if we use too much water. In the meantime, we should create a *Winters* Doctrine in this state. And we should go further than that. We should begin by using some of this knowledge on Indian reservations.

PROFESSOR STRICKLAND:

I would particularly like to thank the American Indian Law Students Association which, with the assistance of the American Bar Association Law Student Division, organized this program, put it together, and is really responsible for it. If the past ten or fifteen years have been exciting in Indian law elsewhere, the next fifteen or twenty in Oklahoma will be unbelievable in terms of the developments which will occur. I recall two statements. One was from the man responsible for the creation of the new city of Chicago after the great fire. He told the people that the bankers who were combining to finance the city's reconstruction were very stingy with the amount of money that they would spend and with the goals that they wanted to accomplish. They were talking about rebuilding various parts of the city and he said, "Make no small plans, for they have not the power to move men." At the same time I always think of the statement of Chief Seattle, "it is hard to hold a great vision." What has been happening in Indian law, particularly with regard to water rights, is a testament to the fact that Indian people working through the legal system can help make and then fulfill great and visionary plans.